

**United States Government
National Labor Relations Board
OFFICE OF THE GENERAL COUNSEL**

Advice Memorandum

DATE: August 16, 2005

TO : Joseph P. Norelli, Acting Regional Director
Region 20

FROM : Barry J. Kearney, Associate General Counsel
Division of Advice

SUBJECT: Agilent Technologies
Case 20-CA-32151

512-5030-4000
512-5036-0117-3333
512-5036-0117-6667
512-7550-0133
512-7550-5000
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This Section 8(a)(1) and (3) case involves the interrogation and discipline of the Charging Party for failing to remove certain uses of the Employer's registered trademark from an independent union website.¹ It has been resubmitted for reconsideration of our prior conclusion that the Employer was entitled to instruct the Charging Party to stop using its trademark, seek full compliance with that instruction and discipline him because it would have taken the same course of action to protect the trademark in the absence of the Charging Party's protected activity.

We affirm our prior decision that the instant charge should be dismissed, absent withdrawal.²

First, we conclude that there has been no disparate treatment of Charging Party Rose with regard to use of the Employer's trademark. An employer violates the Act if it discriminatorily prohibits employees' union activities while permitting substantially similar conduct unrelated to a union.³ Although the Employer prohibited Rose from using

¹ The Employer has registered both its name and "spark" logo as trademarks. The Charging Party had formed the Agilent Employee Association and was using that name in addition to a variation of the logo on the website.

² Agilent Technologies, Case 20-CA-32151, Advice Memorandum dated March 18, 2005.

³ See, e.g., Midwest Stock Exchange, Inc. v. NLRB, 635 F.2d 1255, 1270 (7th Cir. 1980) (unlawful disparate treatment found where employer prohibited employee union solicitation on work time while permitting other similar kinds of solicitations, e.g., for charities, blood drives, and Avon

its trademark on his union website, while permitting other employees to use the trademark in connection with their Company-sponsored recreational group activities, such treatment did not constitute discrimination because Rose and the employee groups were not similarly situated.

Thus, although Rose is an employee, he and the other employee groups - e.g., the ski, bowling and golf clubs, the cycling team and the lunch time "blogging" group - have sought to use the Company name and/or logo in markedly different ways. In contrast to the other groups' use of the trademark for social and recreational purposes that the Employer supports, Rose sought to use the trademark in furtherance of his goal of changing the Employer, with objectives that are in conflict with the Employer's objectives. In our view, Rose's use of the trademark for this purpose, on a website accessible to the public, is not akin to the other groups' use of the trademark, in connection with Employer-supported community sporting events and recreational activities, on the Employer's internal website.⁴ Furthermore, use of the Agilent trademark on the Union website might suggest Employer assistance, sponsorship or promotion of Rose's Union activities and could possibly run afoul of Section 8(a)(2). The Employer has been concerned about potential unlawful recognition concerns from the outset, and Rose conceded, in his February 10, 2005 letter to the Employer's trademark counsel, that it would be unlawful for the Employer to sponsor or endorse the Union or its website. The Employer's policing of its trademark as to Rose appears be consistent with how the Employer would treat outside groups, customers or competitors as to which it had some concern about associating itself.

and Tupperware sales); NLRB v. Northeastern University, 601 F.2d 1208, 1216-1217 (1st Cir. 1979) (unlawful disparate treatment found where employer denied permission to employee labor organization to hold meetings at student center while permitting meetings of student groups, library support staff association, and faculty organizations). See also Black's Law Dictionary 479 (7th ed. 1999) ("discrimination" defined as a "failure to treat all persons equally when no reasonable distinction can be found between those favored and those not favored").

⁴ This analysis is consistent with our decision to issue Complaint regarding the Vintage Press. Rose's attempt to announce the formation of his group on the Employer's internal electronic bulletin board was similar to the use that the other groups had been permitted to make of the Vintage Press.

Our conclusion that the Employer lawfully applied its trademark policy to Rose is not inconsistent with our prior conclusion that the Employer's policy on employee groups was unlawful. We previously concluded that the group policy was unlawful because it prohibited the formation of any employee group engaged in negotiation or representational activities. There would have been no violation if the policy merely stated that the Employer would not charter or lend support to groups engaged in such Section 7 activities. Permitting use of the trademark is a form of "support" given to groups the Employer wants to encourage; the Employer's refusal to provide a similar level of support to Rose's group is not unlawful.

We also adhere to the conclusion that investigating, interrogating and disciplining Rose in connection with his use of the Agilent trademark was not a pretext for retaliating against his protected Union activity. To be sure, there is evidence that the Employer opposes unionization generally and Rose's union activity in particular.⁵ However, there is no evidence that the Employer seized on the trademark issue as a means of retaliating against Rose.⁶ In our view, the Employer's general animus is not sufficient to prove pretext. This is especially true where there is no evidence that any other employee or employee group has been permitted to use the Agilent name in a manner similar to Rose's use, i.e., on an independent website accessible to the public. In addition, we conclude that a recent 9th Circuit case, imposing stricter requirements on proving "commercial use," does not render the Employer's trademark allegation specious. In

⁵ See, e.g., Agilent Technologies, Case 20-CA-31918, Advice Memorandum dated January 31, 2005 at pp. 13-14 (regarding Employer's negative response to newspaper article about Agilepeople and the June 23 mass e-mail to employees stating that allowing employees to speak for others "was not in anyone's best interests," "fundamentally contradicts" Company values, and could "undermine or destroy" the relationship between employees and the Employer).

⁶ Although it may be common for employees to incorporate the name of their employer into the name of a labor organization, such conduct may be challenged as a trademark violation should the employer choose to exercise its trademark rights. See CNA Financial Corp., 264 NLRB 619, 619 (1982) (employer did not violate Section 8(a)(1) by filing a successful trademark suit against a Teamsters local that had used the employer's name and logo on its stationary).

Bosley Medical Institute,⁷ the 9th Circuit held that a "gripe site"⁸ did not constitute "commercial use" of a trademark, and therefore was not an infringement under the Lanham Act, where there were no sales or other commercial activity on the challenged website itself but merely a link to a second website, linked in turn to a third website, that accepted advertising.⁹ Here, there were direct links from the Agilepeople.org website to commercial sites, including links to the CafePress site selling the "Agilepeople" logo items, to an E-bay auction, and to Rose's Amazon.com account where he sold copies of "The Capitalist Manifesto." It is at least arguable that these links would satisfy the Lanham Act's commerciality requirement.¹⁰

Finally, issuing complaint on this allegation would merely add another cease and desist provision to the relief already being sought in the authorized complaint, and is not necessary to facilitate Rose's efforts to organize. The Employer does not object to Rose's use of the name "Agilepeople," and is satisfied with the disclaimers and changes Rose has added to the website. And, it appears that Rose is able to promulgate his message through the website despite the disclaimers. In these circumstances, and in the absence of disparate treatment, it would not be appropriate to make the difficult argument that the Employer's policing of its trademark was pretextual.

⁷ Bosley Medical Institute Inc. v. Kremer, 403 F.3d 672, 674, 676-680 (9th Cir. 2005) (noncommercial use of a trademark as website domain name does not constitute infringement under the Lanham Act).

⁸ A "gripe site" is a website established to air complaints about a particular business or product, typically using the target's trademark on the site and/or in the site's name.

⁹ Bosley Medical Institute Inc. v. Kremer, 403 F.3d at 678 (the links were "too attenuated to render [the defendant's] site commercial").

¹⁰ The Employer's objection to Rose's use of the "7-pointed star" logo also is not entirely unfounded. Thus, exact duplication of a registered trademark is not required to establish liability for trademark infringement; marks need only be confusingly similar. See, e.g., James Burrough Ltd. v. Sign of the Beefeater, Inc., 540 F.2d 266, 275 (7th Cir. 1976) ("[s]ide-by-side comparison [of marks] is not the test" for infringement, but rather "whether the viewer of an accused mark would be likely to associate the product or service with which it is connected with the source of products or services with which an earlier mark is connected").

Accordingly, the charge should be dismissed, absent withdrawal.

B.J.K.